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No. 00-1630

In The

# Supreme Court of the United States

PROFESSOR RAJANI KANTH,

*Petitioner,*

vs.

CORY LEIGH KANTH,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## LIST OF PARTIES

The caption of the case contains the names of all parties.

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## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

Petitioner commenced these proceedings under the *International Child Abduction Remedies Act*, 42 USC § 11601-11610 (referred to herein as "ICARA") (Appendix Exhibit "A," Pages 1 to 9), which Act implements the *Convention on the Civil Aspects of International Child Abduction* (sometimes referred to as the "Hague Convention" or the "Convention") (Appendix Exhibit "B," Pages 10 to 23). The Petition alleges that the removal of the children from Australia was wrongful because that was the state of habitual residence at the time of removal, under the terms of the Hague Convention. Cory Kanth, the Respondent, replies claiming that the United States is the habitual residence and therefore there was no wrongful removal.

### B. THE COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

Mrs. Kanth returned to the State of Utah with the parties' two minor children on March 25, 1999. The Petitioner commenced this action on July 8, 1999. An evidentiary hearing was scheduled for August 24, 1999. At that hearing the parties' settlement which called for the dismissal of the Petition was read on the record and approved by the Court. The Petitioner, though present in Salt Lake City, Utah, did not attend the hearing. Rather, his two attorneys approved the Stipulation. The parties also took advantage of the opportunity to make a record of their settlement of other issues that did not pertain to

the Petition before the Court. These issues involved the parties' divorce. It was clear that the Court was not approving or disapproving the Stipulation but, merely, permitting the parties to make a record of their agreement.

Professor Kanth subsequently discharged his attorneys and appearing *Pro Se* and moved to set aside the Stipulation and Order which motion was granted on October 18, 1999. The matter was set for evidentiary hearing for December 9, 1999. Prior to the hearing the parties were ordered to proffer their case by affidavit and documentary evidence and to allow for the cross examination of all affiants who reside in the United States. Just prior to the December hearing the Petitioner moved to continue the matter, again, and in lieu thereof waived his right to a hearing. The case was decided on the record including the Petitioner's deposition. The Court entered its "Order" December 14, 1999 finding that the Petitioner had failed to establish wrongful removal of the children by the Respondent because the Petitioner had failed to show that Australia was the state of habitual residence of the children. (Order, dated December 14, 1999, Docket No. 68).

## C. STATEMENT OF THE RELEVANT FACTS

1. The parties are both citizens of the United States. (Affidavit of Respondent, dated August 18, 1999, ¶ 4, p. 2, Docket No. 26, attached as part of Respondent's Appendix, hereinafter referred to as "Respondent's Affidavit I"). The parties are husband and wife having been married in

Salt Lake City, Utah March 6, 1990. (Respondent's Affidavit I, ¶ 2, p. 2. Docket No. 26). The parties have two children of the marriage, Malini, born April 1, 1993 and Anjana, born February 20, 1996. (Respondent's Affidavit I, ¶ 3, p. 2, Docket No. 26). The Kanth family purchased a home and lived continuously in Salt Lake City, Utah through June 1996. (Petitioner's Affidavit, ¶¶ 3-5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9).

2. In 1993, Professor Kanth was denied tenure at the University of Utah. He desperately searched for employment in the United States as a professor, sending out between 90 to 150 resumes to various colleges and universities. However, Professor Kanth was unsuccessful. Therefore, shortly following the birth of Anjana, Professor Kanth accepted a temporary academic position with the University of Aarhas in Denmark. (Petitioner's Affidavit, ¶ 5, Exhibit A, Part 2 of Petitioner's Memorandum, Docket No. 9, Respondent's Affidavit I, ¶ 12, p. 4, Docket No. 26). Professor Kanth left for Denmark on June 28, 1996 without Mrs. Kanth or the children. They remained in Utah and later joined him on September 24, 1996. (Respondent's Affidavit I, ¶ 5, pp. 2 & 3. Docket No. 26). Mrs. Kanth and the children left Denmark on April 16, 1997 without Professor Kanth and returned to Salt Lake City, Utah. Upon their return to Utah, Mrs. Kanth enrolled Malini in preschool. She made many friends and excelled in school. (Respondent's Affidavit I, ¶ 43, pp. 19 & 20, Docket No. 26).

3. Professor Kanth joined his family in Utah on June 3, 1997. He immediately began looking for employment as a professor at colleges and universities in Utah, and, alternatively, throughout the United States. He sent out

hundreds of resumes to American schools over several months.

However, he was once again unsuccessful in finding a job in the United States. (Respondent's Affidavit I, ¶¶ 5, 12, pp. 2 & 3, 4 & 5, Docket No. 26). He did receive a six-month appointment at the University of New South Wales in Australia. Neither Mrs. Kanth nor the children wanted to move. They voiced their opposition to Professor Kanth on several occasions. However, because of the family's precarious financial situation, Professor Kanth accepted the position. He told Mrs. Kanth it would only be for six months and could lead to a position in the United States. On this basis, Mrs. Kanth agreed to accompany him with the children. (Respondent's Affidavit I, ¶ 19, p. 7, Docket No. 26).

4. The Kanth family obtained a temporary visa and arrived together in Australia on July 17, 1997. They left all of their furnishings and personal belongings, other than a limited amount of clothing, in storage in Salt Lake City, expecting to return within six months. (Respondent's Affidavit I, ¶¶ 5, 13, pp. 2 & 3, 5 & 6, Docket No. 26). During their first three weeks in Australia, the family stayed in a temporary lodge. They later rented a fully-furnished apartment for which they signed a six-month lease. (Respondent's Affidavit I, ¶ 73, p. 28, Docket No. 26).

5. While in Australia, Professor Kanth's controlling and abusive behavior toward Mrs. Kanth worsened. He threatened to "kick [her] teeth in" when he discovered she bathed the children without his permission. He refused to allow her to choose the childrens' clothing. He

called her derogatory names in front of the children, such as "squaw," "Avon lady," "low class," and "idiot." He stood over her when she brushed the children's hair and angrily grabbed the brush from her hands if either said "ouch." He allowed her to leave the house only to take Malini to and from school and to buy groceries. (Respondent's Affidavit I, ¶ 47, p. 21, Docket No. 26). While the family was in Australia, Professor Kanth continued to search for employment in the United States. He failed to obtain any offers. The family had no money to return to the United States. Therefore, when the University of New South Wales offered him a six-month extension, he accepted. (Respondent's Affidavit I, ¶¶ 21, 22, pp. 8 & 9, Docket No. 26).

6. Because the family's six-month lease on their first apartment expired, they found alternative housing. They signed another six-month lease but broke it early to return to Salt Lake after three months. (Respondent's Affidavit I, ¶ 21, p. 8, Docket No. 26). During their entire stay in Australia, Professor Kanth kept control of each family members' passport. (Respondent's Affidavit I, ¶ 21 p. 8, Docket No. 26). Professor Kanth did not complete his second six-month term with the University of New South Wales. He, instead, returned with Mrs. Kanth and the children to the United States on April 6, 1998 in search of employment there. (Respondent's Affidavit I, ¶ 22, pp. 8 & 9, Docket No. 26). The return to Salt Lake City in March 1998 was intended to be a permanent relocation to Salt Lake City. The return to Salt Lake City was occasioned due to the Petitioner's insistence and the parties' mutual dissatisfaction with their life in Australia. (Affidavit of Respondent, dated November 30, 1999, Docket No. 63,

attached as part of Respondent's Appendix, hereinafter referred to as Respondent's Affidavit II, ¶¶ 8-12, pp. 3 & 4). Mrs. Kanth again enrolled Malini in preschool. She and Anjana reunited with several friends and enjoyed playing with them. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26). Professor Kanth looked at several apartments in Salt Lake, where he also made many job inquiries. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26).

7. Professor Kanth was again unable to find employment as a professor in the United States. He, therefore, accepted a position previously offered to him at the University of Technology, Sidney. (Respondent's Affidavit I, ¶ 23, pp. 9 & 10, Docket No. 26). Professor Kanth was never satisfied with the position at the University of Technology, Sydney (UTS). This position was that of a lecturer and he considered it a "step down" from his earlier position at the University of New South Wales. (Respondent's Affidavit II, ¶ 17, pp. 6 & 7, Docket No. 63). Professor Kanth's disappointment and dissatisfaction with his UTS position is supported by E.K. Hunt, Economics Professor and Chair of the Department of Economics, University of Utah, who states:

> " . . . UTS (University of Technology of Sydney) is a new college that was until recently a technical school. Employment at that school would generally be regarded by most academics as one of the least desirable positions in the academic world." (Affidavit of E.K. Hunt, November 30, 1999, Docket No. 22, p. 1).

8. Mrs. Kanth again objected to going back to Australia. However, Professor Kanth assured her that a position at Duke University would come through and the family would only be in Australia, for two months at the very longest. Professor Kanth agreed that in the event the position at Duke did not materialize, Mrs. Kanth would return to Utah with the children. Based upon these representations, Mrs. Kanth agreed to again accompany him. (Respondent's Affidavit I, ¶¶ 24-25, p. 10, Docket No. 26). The family was scheduled to leave for Australia on July 5, 1998. However, none of them wanted to go. They loaded the few suitcases they packed into a van but decided not to leave. The next day, Professor Kanth determined the family would have to go. He told them to put their bags into the car. They left so quickly between the time he made the decision and the time they left that they barely had time to reload their bags. The family left reluctantly for Australia on July 6, 1998. Their property again remained in storage. (Respondent's Affidavit I, ¶ 29, pp. 11 & 12, Docket No. 26). When they arrived, they negotiated a six-month lease for a fully-furnished home that included a car. That was the shortest lease period the Kanth's were able to obtain. (Respondent's Affidavit I, ¶ 29, pp. 11 & 12, Docket No. 26).

9. Professor Kanth's abusive behavior toward Mrs. Kanth worsened. He monitored Mrs. Kanth's time very closely. He only taught school two evenings a week and was at home the rest of the time. He allowed Mrs. Kanth to leave the home only with his permission, only for a reason acceptable to him and only for a specified time. The infrequent occasions she was allowed to leave, he became enraged if she was not home at the precise time

he calculated she should arrive. (Respondent's Affidavit I, ¶¶ 48-49, pp. 21 & 22, Docket No. 26). Professor Kanth completely controlled the family's money. He refused to give Mrs. Kanth money for anything but necessities, such as groceries or school expenses for the children. The money he gave her for these things was minimal. When she returned from shopping, Professor Kanth compared the amount she had spent with the amount of money he had given to her. He required her to give him any change. (Respondent's Affidavit I, ¶ 48, pp. 21 & 22, Docket No. 26).

10. Professor Kanth gave Mrs. Kanth no money with which to open a checking account and, because of a bankruptcy he filed in their names several years earlier, she was unable to obtain a credit card. (Respondent's Affidavit I, ¶ 48, pp. 21 & 22, Docket No. 26). On August 29, 1998, Professor Kanth discovered that Mrs. Kanth had bathed the children while he was at work. He became enraged and told Mrs. Kanth she "couldn't be trusted," and that he would "have to figure out what to do about it." Mrs. Kanth asked Professor Kanth to allow her to return to the United States with the children, as he earlier promised and file for a divorce. He told Mrs. Kanth in front of the children that she was "nothing but a squaw" and he would "rather shoot myself in the head than allow you and your family to raise these little girls." (Respondent's Affidavit I, ¶ 42, pp. 18 & 19, Docket No. 26).

11. The Kanths never planned to look for a house because they intended their stay to be temporary. (Respondent's Affidavit I, ¶ 74, p. 28, Docket No. 26). The children were isolated. The few extracurricular activities in which they participated were minimal. Malini took

only three music lessons and one ballet lesson the entire time they lived in Australia. (Respondent's Affidavit I, ¶¶ 65-66, p. 26, Docket No. 26). None of the jobs in the United States materialized. Professor Kanth, however, continued to refuse to allow Mrs. Kanth and the children to return, as he promised. Malini repeatedly stated she wanted to go home and asked on several occasions when they would return to Utah. (Respondent's Affidavit I. ¶ 32, p. 13, Docket No. 26). In January 1999, Professor Kanth received an offer of temporary employment from a university in Singapore. Singapore is not a party to the Convention. Mrs. Kanth became worried about Professor Kanth's threats that he would not allow her to raise the children. She feared that Professor Kanth would retain the children and she would lose any legal rights she might have to them. (Respondent's Affidavit I, ¶¶ 33-34, pp. 13 & 14, Docket No. 26).

12. Professor Kanth suggested that she and the children return to the United States while Professor Kanth tested the Singapore job. Professor Kanth told Mrs. Kanth that "his" children would never again enter her parent's home except with him there. He stated that their children would be better off in India around "proper" people and the children. India is not a party to the Convention. (Respondent's Affidavit I, ¶¶ 33-34, pp. 13 & 14, Docket No. 26).

13. Professor Kanth traveled to Utah on April 3, 1999. He did not appear to be upset that Mrs. Kanth and the children had left. He seemed relieved to be back in the United States. He never demanded that the children return to Australia. (Respondent's Affidavit I, ¶¶ 35 & 36, pp. 4, 7, 5, Docket No. 26). Professor Kanth resumed

searching for employment in Utah and the United States. When he was again unsuccessful, he returned to his job at the University of Technology, Sydney, on April 22, 1999. (Respondent's Affidavit I, ¶ 37, pp. 15 & 16, Docket No. 26).

14. Professor Kanth always kept a mailing address in Utah. He obtained a post office box and later listed Mrs. Kanth's parents' residence as his own on numerous receipts and applications while in Australia. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26). Professor Kanth maintained his Utah driver's license and eligibility to vote while abroad. (Respondent's Affidavit I, ¶ 15, p. 6, Docket No. 26). While in Australia, the children visited doctors for various childhood illnesses. They did not have one doctor in Australia but saw several for various illnesses. (Respondent's Affidavit I, ¶ 51, p. 22, Docket No. 26).

15. During the pendency of this Petition, as early as June 1999, Professor Kanth accepted a one year teaching position at Wagner College in New York. The Petitioner failed to disclose this new contract and teaching position as well as his intention to return to the United States until sometime after the initial hearing was scheduled. It was only when it would be too difficult to conceal his whereabouts that he disclosed his relocation. The Petitioner stated many times that he believed even one semester at a "state side" university or college would give him the opportunity to seek something more permanent in the United States. (Respondent's Affidavit II, ¶¶ 37, 40, pp. 10 & 11, Docket No. 63).

16. The Petitioner has now accepted yet another position, this time in Singapore, according to his current notice of change of address on file herein.

## REASONS FOR DENYING THE WRIT

The Petitioner does not present an issue which would support granting a Writ of Certiorari. The Petitioner merely restates his factual and legal argument made below. The Petitioner does not martial the evidence which would support the ruling of the District Court and the Tenth Circuit Court of Appeals. After considering the facts as they relate to: (1) the intent of the parties; (2) the time involved; and (3) the geography, the Court concluded that the United States was the State of habitual residence for the Kanth children. The question is one primarily of the parties' intent. This is particularly the case where the visit was for a period of less than one year.

The parties behaved as though the visit to Australia was meant to be temporary. All of their personal furniture and effects were left behind in Utah. The parties maintained a Utah address and all other legal attachments (e.g., drivers licenses, mailing address, voter registration, etc.). The parties were used to frequent and temporary moves. The parties and their children moved seven times while in Australia. The children never acclimatized to Australia.

The Petitioner emotionally abused and physically controlled the Respondent. The physical control was accomplished by way of physical abuse, threats and

financial control. This extended the parties otherwise temporary stay in Australia. All during the temporary stay in Australia the Petitioner desperately sought employment in the United States. Finally, after commencing his Petition, the Petitioner moved to New York having taken a teaching position there only to subsequently move to Singapore where he currently resides.

After Ms. Kanth returned to Utah with the children, Professor Kanth indicated his acquiescence to the move. This occurred in the form of letters written by Professor Kanth. Even if Ms. Kanth's return was "wrongful" in the first place, Professor Kanth's acquiescence constitutes a complete defense to his claim pursuant to the Hague Convention.

The other reasons sited by the Petitioner are disingenuous. The Trial Judge was gracious in extending to Professor Kanth opportunity after opportunity to retain counsel, to appear personally in Court, and to generally comply with the Court's orders. Professor Kanth was finally given an opportunity to appear at the trial but instead he requested a continuance. Professor Kanth agreed with the Court for the Court to resolve the case based upon the written record without his appearance. Professor Kanth waived his right to a hearing. (Petitioner's Appendix "C," 2, footnote 1). Professor Kanth had ample time to secure new counsel but was not represented by counsel because he either delayed or was disingenuous in making the request in order to secure continuance.

The United States Tenth Circuit Court of Appeals properly reviewed Professor Kanth's Motion for a Stay.

However, for all of the reasons set out in the denial of that Motion, the Motion was not well taken. (Petitioner's Appendix "D").

Professor Kanth last argues that the recording of the parties' settlement on the record somehow prejudiced his rights. First of all Professor Kanth had the opportunity to attend the first trial and failed to appear. His two attorneys, representing proper authority for a settlement, agreed on the record not only to resolve the Petition, but other matters as well. The District Court noted that it lacked any jurisdiction over the other matters agreed to. The purpose of the Stipulation was simply to preserve it on the record. In any event, the "settlement" was set aside at the request of the Petitioner. (Petitioner's Appendix "G").

## SUMMARY OF ARGUMENT

The Hague Convention considers the removal of a child from his or her habitual residence wrongful. The Convention is designed to order the return of the child to the child's habitual residence more or less as a jurisdictional determination. In this case the children were not removed from their state of habitual residence but returned to their habitual residence in the United States of America, State of Utah.

The term "habitual residence" is an issue of fact and not subject to hyper-technical legalistic interpretations or tests. The case law has emphasized three factors determining habitual residence: (1) the parties' intent or purposeful design, including voluntariness of their decision;

(2) time; and, (3) geography. Where the period of residence is less than one year decisions on habitual residence depend primarily on the parties' intention. Where the residence was less than one year, Courts are much more inclined to find a temporary purpose for the residence and therefore no change in habitual residence.

The parties' two visits to Australia with their children were intended and designed to be temporary. All of their behaviors were consistent with this temporary design. Their furniture and personal effects were left behind in Utah.

They maintained a Utah address and all other legal attachments (driver's license, mailing address, etc.). The parties and their children moved seven times while in Australia. The children did not acclimatize. The Petitioner emotionally and physically controlled the Respondent so that she stayed on longer in Australia than was intended or promised. The Petitioner desperately sought employment in the United States during the entire time he was in Australia. Finally, the Petitioner moved to New York to take a position there and has since left New York to take a position in Singapore.

When Mrs. Kanth returned to Utah, Professor Kanth clearly acquiesced in the move. Even if her return was "wrongful" Professor Kanth's acquiescence is a complete defense to the Hague Convention Petition.

## ARGUMENT

### I. CORY KANTH'S RETURN TO UTAH WITH THE PARTIES' CHILDREN WAS NOT WRONGFUL BECAUSE THE UNITED STATES WAS THEIR HABITUAL RESIDENCE.

Article 3 of the Convention provides, in pertinent part, that:

> "The . . . retention of a child is to be considered wrongful where . . . paragraph (a) it is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually residing immediately before the removal or retention."

This case does not present an issue regarding Professor Kanth's rights of custody. Therefore, the principal issue before the Court regards the children's habitual residence when Cory Kanth returned to the State of Utah on March 25, 1999.

The terms "habitual residence" is not defined under the convention. Instead a child's habitual residence is to be determined by examining the specific facts and circumstances in each case. *Zucker v. Andrews,* 2 F.Supp. 2d 134 (D. Mass. 1998); *Meredith v. Meredith,* 759 F.Supp. 1432 (D. AZ., 1991); *LeVesque v. LeVesque,* 816 F.Supp. 622, 666 (D. Kan., 1993). Courts should not interpret the term technically or restrictively. *Rydder v. Rydder,* 49 F.3d 369, 373 (8th Cir. 1995).

> "The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all of the circumstances of any particular case." (*Lord Brandon of Oak Brooke, In Re Jay (a minor)*

*abduction; custody rights)* [1990] 2 A.C., @ P. 578; [1990] 3.W.L.R. @ P. 504; [1990] 2.ALL E.R. @ P. 965.

Determining the fact question of habitual residence involves the consideration of three principal elements: (1) intent, voluntariness, or purposeful design; (2) a lapse of a sufficient period of time; and, (3) geography or location (see, *The Concept of Habitual Residence*, Dr. E. M. Clive, the Juridical Review, 1997, Part 3, Page 137, included in Respondent's Appendix as Exhibit "C," Pages 24 to 35).

In *Application of Ponath*, 829 F.Supp. 363 (D. Utah 1993) habitual residence in Germany was not found where the parties' visit to Germany was based upon Mr. Ponath's promise to return within three months. Additionally, Mr. Ponath refused to let his wife and child leave and the Court found that she was detained in Germany against her desires by means of verbal, emotional, and physical abuse. In spite of a ten-month stay in Germany Mr. Ponath's Petition to return the child to Germany was denied. Judge Sam declared, "The Concept of Habitual Residence must . . . entail some element of voluntariness and purposeful design . . . [a] settled purpose." *Application of Ponath, Id.* @ 367.

> "Where the period of residence is less than a year there are decisions both ways. Much depends on purpose or intention in this type of case and Judges are much more likely to find that a temporary purpose for the residence prevents it from being habitual residence." (*The Concept of Habitual Residence*, Dr. E. M. Clive, *Id.* @ p. 27).

Although it takes time to establish habitual residence, it takes no time at all to terminate that status. All that is required is an intention on departure to stay permanently in another country. See *International Child Abduction*, Sandra Davis, Jeremy Rosenblatt and Tanya Galbraith, Seet & Maxwell, 1993, P. 55, citing, *C v. S* (Minor: Abduction: Illegitimate Child), @ P. 55 (the summary of this case, together with its full citation, is attached hereto in Respondent's Appendix Exhibit "D," Page 36). In *C v. S* an unmarried couple had a child born to them in 1987 while they resided in Australia. In 1990 the mother returned permanently to England without informing the father of her intention or preparations. Before the unmarried father could establish his rights of custody, the Court found that the mother had established habitual residence in England. The former habitual residence in Australia had been terminated immediately upon her departure.

In this case, the parties disagree as to their intention regarding both trips to Australia. Mrs. Kanth maintains that in both cases the trips were meant to be temporary with the specific intention to return at the earliest opportunity. Furthermore, Professor Kanth has documented that mutual intention extensively. The Kanth family took only clothing with them when they went to Australia on both occasions. They rented fully furnished apartments in Australia and moved seven different times. All of their important furniture and belongings remained in Utah anticipating their return. These belongings included personal mementos and items of particular significance to the children such as their toys, a child's rocking chair, family pictures and the like.

Even if the parties established habitual residence in Australia during their first visit, which is strenuously denied by Mrs. Kanth, that status was terminated upon their first return to the United States. At the time of their first return in the spring of 1998, the parties left their apartment and forfeited a substantial lease deposit. Their departure was abrupt. It was occasioned by Professor Kanth's reliance upon "psychic" readings and advice. Upon their return to the United States the oldest daughter was re-enrolled in school. The children were attended to by their historical family physician. All in all, their old family life resumed and went forward in Utah.

The parties' first visit to Australia was less than satisfactory. The family continually discussed their imminent return to Salt Lake City. The children had not acclimatized or socialized well in Australia. At all times relevant to these proceedings Professor Kanth maintained the family mailing address in Utah and listed it as his residence on his applications for employment and directed that responses be sent there. In fact, Professor Kanth set in place detailed plans and instructions with his father-in-law regarding correspondence and communication from prospective employers. Professor Kanth also listed the family's Utah address on numerous personal receipts and forms. He maintained his Utah driver's license and eligibility to vote. The Visa giving the family permission to live in Australia was for a temporary period.

When Professor Kanth could not find employment in the United States as soon as he had hoped, the parties saw no alternative but to return to Australia for a brief and temporary period of time in July 1998. Having

already visited Australia the parties were certain that they did not want to remain. Professor Kanth anticipated job opportunities including one particular position at Duke University. Mrs. Kanth was reassured and promised that the second visit to Australia would be for a period of weeks perhaps up to six weeks at the longest. With that in mind, the family visited Australia once again exhibiting the same behaviors they did before but with a new found resolve to limit their stay in Australia all the more. For the second visit the parties were certain that they did not wish to reside in Australia and Professor Kanth was certain that they would not have to, but for a very brief period of time.

Professor Kanth attempts to minimize the significance of his extraordinary job search efforts. He has stated that his hundreds of applications for employment in the United States, while he was employed at UTS, and at the expense of UTS, constitute a common practice in the industry. Dr. E.K. Hunt, Professor of Economics and Chair of the Department of Economics at the University of Utah observed that such a practice is unusual:

> "I do not know a single academic who has used either applications or job offers in this way. I have heard stories of this being done. I can state, however, that it is very rare, and that in no case, in these stories, has a person sent out hundreds of applications. Where it is done, the individual is virtually always a famous, very highly regarded academic and two prestigious universities are 'bidding' for him or her. I can assure you that Rajani Kanth does not fall into this

> category. I seriously doubt if any faculty member in either UTS or Wagner College fits this category.
>
> I believe that any fair minded academic seeing an instructor at UTS sending out hundreds of applications would conclude that the instructor is desperate to leave. When Dr. Kanth communicated with me I definitely felt that he wanted desperately to leave." (Affidavit of E. K. Hunt, dated November 30, 1999, p 2, Docket No. 22).

It is during this same time, during the second visit, that Dr. Kanth's efforts to control the Respondent intensified, just as in the *Ponath* case. Not only did Dr. Kanth engage in emotional abuse and control, Cory Kanth was financially restrained from leaving and Dr. Kanth maintained physical possession of the passports until shortly before the Respondent's departure with the children.

Lastly, from the children's point of view, it cannot be said that Australia was ever their habitual residence. The parties' oldest child, Malini, attended school but only sporadically. She was referred to as "the American visitor". Her accent was ridiculed. She ate lunch alone and only made her first friend a couple of months before returning to the United States. That friend only visited the Kanth household once to play with Malini.

It cannot be found that a sufficient period of time elapsed in either the first visit or the second so as to conclude on that basis alone that Australia become the children's habitual residence. Therefore, the Court must discern the parties' intention from the objective evidence as much as possible. This was Judge Campbell's stated

objective. Judge Campbell structured a "fast track" procedure and stated in the process that she would give particular weight to the documents and objective evidence when comparing those facts to the parties' own testimony. In the process the Court properly concluded that the parties never had the proper intent to make Australia their residence and therefore lacked the "settled purpose" often referred to in Hague Convention case law. Judge Campbell was particularly impressed that the Kanth children never acclimatized to the Australian environment given the fact that there was no "settled purpose". Judge Campbell did not address the issue of "voluntariness", controlling behavior on the part of Professor Kanth, or the emotional physical abuse. Similarly, the Court did not address the issue of Professor Kanth's acquiescence. However, these two factors would also be grounds to sustain the Court's result.

## II. PROFESSOR KANTH ACQUIESCED TO CORY KANTH'S RETURN TO SALT LAKE CITY WITH THE CHILDREN.

Even if Australia was the habitual residence of the Kanth family on March 25, 1999, that status would have been terminated based upon Mrs. Kanth's return to Salt Lake City and Dr. Kanth's acquiescence thereto. Acquiescence is defense to an otherwise well taken Hague Convention Petition. See *In Re A and another (minors) (abduction: acquiescence)* [1992], 1 ALL ER 929, CA; [1992] FAM. 106, Respondent's Appendix Exhibit "E", Pages 37 to 54. In *In Re A and another (minors)* the Court ignored a mother's secret moving of her children from Australia to England by finding that the father in his letters to the

mother stated that he knew of the mother's actions, understood they were illegal but was not going to fight the matter.

Here the Petitioner wrote a letter to Marvin Meyer, the Respondent's father, which bears the "fax" date of April 5, 1999 which is document 032-033 attached to Respondent's Affidavit I, Docket No. 26. That letter states as follows:

> "I am trying my best, as I have had for years, to find employment back in the US: in the very short run, this may or may not happen. But the long-run prospects remain very high given the level of my productivity. It may happen as early as this fall or may be a bit later . . .
>
> I have promised to organize life differently for her; we can buy a house here and live normally instead of living as if we were leaving the next day as we have since we arrived in Australia.
>
> Of course this is up to Cory: but you are my father-in-law, and about the only family I have left, and I want to be assured that the basis exists now – as it has for some time now – for normalcy in our lives battered as we have been thus far by frequent moves.
>
> If Australia does not please her, and this is important for you to know, I am ready now to return to Utah and look for employment there, no matter what it takes.
>
> . . . I have a permanent job here, Cory will have one to. But only if she chooses to: if not, I will try to find a similar set up in the US ASAP so the kids and Cory can be close to family again. It is for this reason that I have spent the last five years applying to jobs in the US."

Once again, the Petitioner made good on his expectation. Before this case had even reached its first hearing, Dr. Kanth had accepted a position in New York at Wagner College although he failed to disclose that fact in time for the first hearing, August 24, 1999. The Wagner College posting was for a period of one year. Dr. Kanth testified that he still had his UTS position waiting for him. While this matter has been on appeal Dr. Kanth has taken yet another position in Singapore, thus continuing the "peripatetic existence" that the parties had experienced for years ("Order" Judge Tena Campbell, December 14, 1999 at Page 4 quoting the letter from Owen to Kanth to May 11, 1999, document page number 020, exhibits to Respondent's Affidavit I, Docket No. 26).

## III. THE OTHER REASONS CITED BY THE PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI ARE INADEQUATE FOR THAT PURPOSE.

Professor Kanth suggests that his Petition be granted because: (1) he was denied due process for lack of counsel and in the absence of his personal appearance at the trial; (2) the Tenth Circuit improperly denied his Petition for a stay of proceedings; and (3) the Court should not have entertained the settlement of his case at the first trial setting.

Professor Kanth had more than ample time to secure an attorney. He had hired and discharged two attorneys before.

The Tenth Circuit Court of Appeals properly denied Professor Kanth's Motion to stay the State Court proceedings. Professor Kanth's Motion was inadequate. He has simply restated that same Motion in his Petition before this Court.

The trial Court's entertainment of a settlement in no way prejudiced Professor Kanth's Petition. When Professor Kanth sought to set aside the settlement his Motion was granted. Professor Kanth has no one to blame but himself for the settlement in the first place. He failed to appear for the first trial setting and his attorneys acted on his behalf with full apparent authority to do so.

## CONCLUSION

Mrs. Kanth's return with the parties' children to Utah was not wrongful. The United States, State of Utah was and remains the childrens' habitual residence for purposes of the Hague Convention. All of the parties' actions were consistent with their intention to live in Utah. Their visits to Australia were purely temporary. The children never became attached to the Australian residence or environment.

Even if the removal of the children was wrongful, Professor Kanth acquiesced to their return. During the pendency of this case Professor Kanth has relocated to the United States which effectively moots any claim under the Hague Convention.

The Order of Judge Tena Campbell dismissing the Petition should be upheld.

DATED THIS 25th day of May, 2001.

Respectfully submitted,

GREEN & BERRY
FREDERICK N. GREEN
*Attorney for Respondent*

**APPENDIX**

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

| | |
|---|---|
| RAJANI K. KANTH<br>Petitioner,<br>vs.<br>CORY LEIGH KANTH<br>Respondent. | AFFIDAVIT OF CORY LEIGH KANTH, DATED NOVEMBER 30, 1999<br><br>Case No. 2:99 CV 532 C<br><br>Magistrate Samuel Alba |

STATE OF UTAH )
: ss
COUNTY OF SALT LAKE )

CORY LEIGH KANTH, being first duly sworn upon her oath, deposes and states as follows:

1. I have received and reviewed the Petitioner's supplemental "Affidavits in Support of Reply to Respondent's Memorandum and also Petitioner's Reply to Respondent's Memorandum" dated November 6, 1999 together with a supplemental affidavit mailed to the Court, and not served upon my counsel until the Court sent a copy to him on November 15, 1999.

2. By and large the affidavits in support amount to character references and the other letters, court filings, and the like which duplicate earlier filings in this case.

3. The Petitioner's *Pro Se* "Reply" contains a number of allegations which are not supported by evidence or affidavit. Rather, these allegations contain the testimony of Mr. Kanth.

4. In particular, the Petitioner's "Reply" contains allegations regarding the parties "settled intent" to reside in Australia as well as my intent.

5. This affidavit is meant to address the factual allegations of the Petitioner's "Reply" particularly those that relate to the intention of the parties, the circumstances surrounding our first departure from Australia, the circumstances surrounding our return to Australia and the failure of the children to acclimatize to the Australian environment.

## I. THE PARTIES FIRST DEPARTURE FROM AUSTRALIA

6. The Petitioner alleges that the parties first departure from Australia, in March 1998, was due to an assault on your Affiant and a resulting emotional response. There is nothing except for the Petitioner's own testimony to support this allegation.

7. No such assault took place. The Petitioner refers to an incident when I broke down and cried, in December 1997, when contemplating the state of my marriage and the likelihood of divorce. A shop keeper who witnessed my crying offered some consolation and in a gesture of

compassion and nothing else kissed me on the forehead. I later related this instance to the Petitioner and he has now attempted to blow it out of proportion. Suffice it to say I was not distressed, I was not distraught, I sought no professional help due to this incident, and I never referred to that incident again for any purpose.

8. In fact, the Petitioner wished to return to the United States and Salt Lake City for his own personal reasons.

9. The Petitioner has regularly relied upon a psychic and those who would analyze the "horoscope".

10. As an example, the Petitioner sent to me a horoscope analysis that he obtained this summer, attached and marked Exhibit "A". The Petitioner sought and received a similar horoscope in January 1998 which revealed to him some distressing news. The horoscope or the psychic told him that he had a physical problem which the Petitioner interrupted as potential cancer. For that reason he sought out the help of therapists in order to make his case for a "health leave of absences" from his current position at the University of New South Wales. He was successful in doing this and resigned his position at New South Wales and we returned to Salt Lake intending that it be permanent return.

11. In addition to the Petitioner's distress over his horoscope diagnosis, he was also dissatisfied with his future prosects [sic] for employment in Australia, and neither of us found Australia to meet our needs and more importantly the needs of our children and so we intended to make our return permanent when we left Australia the first time.

12. As a result, we treated our return to Salt Lake City in 1998 as a permanent relocation and took all of the steps consistent with that intention including the registration of the children in school, securing medical care for the children, seeking employment here, and unpacking and using our personal property which we had left behind during our first trip to Australia.

13. The only support for the allegation that I was unstable after the alleged assault are the affidavits of Dr. Jan Hogan and Ms. Jenean Costa. I have never visited with either of these witnesses except very briefly and socially. I never consulted with Dr. Hogan as there was no need. Rather, Dr. Hogan diagnosed Mr. Kanth as suffering from depression.

14. The Petitioner has spread rumours about my mental state since at least 1997. It was only recently that I have discovered the extent to which he has spread these rumours. Likewise, it is only recently that I have discovered that his personal disparagement of me was meant to be a control technique of his should I ever decide to separate from him as I have repeatedly suggested since about that same time, 1997.

15. In fact, in 1992 I was hired by the Central Intelligence Agency and given their highest level of clearance following a thorough background check including interviews of all former employers, colleagues, and neighbors and a two day psychological evaluation including a polygraph examination.

## II. THE CIRCUMSTANCES SURROUNDING THE PARTIES RETURN TO AUSTRALIA

16. For all of the reasons outlined in my earlier affidavits, our return to Australia in July 1998 was meant to be temporary.

17. Mr. Kanth was never satisfied with the position he had at the University of Technology, Sydney (UTS). The position was that of lecturer. It constituted a "step down" from his earlier position at University of New South Wales. Also we all desired to reside in the United States.

18. Mr. Kanth had some employment prospects which were immediate, including a position at Duke University. Our expectation was that we would fulfill a portion of the first six month contract with UTS and then return to the United States to take a position at Duke University. To that end, the Petitioner set up a method by which stateside Universities would correspond to a Salt Lake City address thereby not revealing his current position at UTS.

19. I am still discovering different Universities that he applied to during the entire period of time he worked at UTS. In each case, the return address that he employed was that of 2736 East 7305 South, Salt Lake City, Utah. Exhibits "B", "C", and "D" are some of the letters in response to Mr. Kanth's applications in addition to those I put forth earlier.

20. Exhibit "E" is a list of Universities where I helped the Petitioner apply for employment while he was an instructor at UTS.

21. The reasons for our wishing to return are set out in my earlier affidavit and may be summarized as follows:

a. The inability of our children to acclimatize to the Australian circumstances.

b. The health concerns we had for our children in Australia.

c. The Petitioner's dissatisfaction with his employment circumstances in Australia.

d. Family members resided in the United States.

e. The fact that it was difficult to obtain United States employment while residing abroad.

22. Mr. Kanth suggests that his job search activities were ordinary for an academic and not indicative of our desire to leave Australia. There was nothing ordinary about the Petitioner's job search. It was time consuming and he often complained to me that he had very little time for his real work because so much of his time was taken up in attempting to get back to the United States.

23. The Petitioner's job inquiries were directed at every level of employment, even as instructor at a community college or a temporary assignment of a fellowship or the like.

24. I am informed by people in the industry that job searches of this are very unusual and suggest disloyalty to the academic's current employer. This is in addition to the fact that the cost of the job search was actually being

passed along to UTS by the Petitioner. This cost was estimated to be $10.00-$15.00 per application.

25. The Petitioner corresponded with Professor Robert Heilbroner. Mr. Kanth confided in Professor Heilbroner about the depth of his discontent with Australia and his desire to leave there at any possible opportunity. However, Mr. Kanth always portrayed his reasons for wanting to return to the United States as having more to do with my discontent or other family problems. I am aware of the correspondence between Mr. Kanth and Professor Heilbroner because the correspondence was routed through my parent's address in Salt Lake and my mother was given the duty of opening and reading the mail (see document 056 in my original document submission).

## III. THE CHILDREN'S FAILURE TO ACCLIMATIZE TO THE AUSTRALIAN ENVIRONMENT

26. Malini, the oldest child, is an excellent student and performed well academically in Australia. However, Malini continued to complain about feeling uncomfortable among her Australian peers and very self conscious because of her "American accent" (her words) and so on. I give greater detail of these circumstances in my August 18, 1999 affidavit.

27. Exhibit "F" is Malini's second grade, Cottonwood Heights Elementary School report card. This report card should be compared with her Kindergarten report card, from Australia document pages 1443-1440. The report cards from the Australian Kindergarten showed

that Malini was having difficulties following whole class instructions, was demonstrating timidity, and further behavioral difficulties. Her US report card gives her honor grades in all areas including "listening and following instructions" and "getting along with peers".

28. While in Australia we attempted to on many occasions to integrate the children into the Australian culture. However, this proved difficult because of:

a. The obvious cultural differences.

b. The Petitioner's reluctance to allow the children to freely and fully associate with other children in the area (sometimes due to health concerns).

c. Our frequent moves while residing in Australia (7 times during the totality of our stays).

d. Our continual discussion, involving the children, indicating our anticipated return to the United States as soon as possible.

## IV. MISCELLANEOUS ALLEGATIONS

29. The Petitioner alleges that my allegations regarding his use of the children's passports as a control device are false. Document pages 296-310 consist of the Petitioner's poem/letter which is particularly revealing in several respects. On page number 305 he states "I ask you for the passports and you/felt I wish to steal our jewels/from you/I know/I knew/ that is what you thought . . . ".

30. That same poem/letter reveals his apology for his disparaging comments and verbal abuse at page 298:

"mens words like whips and so have I . . . " and " . . . mens anger get staringly projected my guilt made me angry with me . . . so I threw words . . . strong words . . . ".

31. That same poem/letter also indicates, age [sic] page 306 his desire to return to the Untied [sic] States and "find a job back in the US . . . " when I held/my head and sat/in pain/it was thinking of ways/multiple ways to get us out/fast . . . ".

32. The letter of Dr. Jane Dean of Wagner College suggests that the Petitioner took a "substantial cut in pay to come to Wagner College". In fact, the income is similar if not slightly in excess of the UTS salary.

33. The Petitioner has represented to the Court, at the status conference as follows: "I simply could not afford to pay American lawyers on an Australian salary, which is why I took leave from the University and sought a temporary position, which is what I have currently . . . " (Transcript of status conference, October 18, 1999).

34. Furthermore, the Petitioner's suggestion that there is some income tax advantage to working in Australia is false. Attached and marked Exhibit "G" is the "Amended Assessment" for the Australian tax office showing a tax rate of approximately 29% which is roughly comparable to that which we would experience in the United States.

35. The Petitioner has shown a history of seeking and obtaining employment leave typically for health and family reasons. Not only was this the justification for the early departure from the University of New South Wales

in the spring of 1998, it is the reason that he has suggested now for his open ended leave of absence from UTS.

36. This is fortuitous for the Petitioner because it not only allows him to have a "fall back" position at UTS (which serves his position in these proceedings) but it also allows him to work stateside where he may more actively seek long term employment in a position that meets his criteria and expectations in ways that the UTS position cannot.

37. The Petitioner has told me many times that even one semester in the United States would give him the opportunity to seek something more permanent here with one institution or another.

38. The Petitioner suggests that I was actively seeking employment in Australia during our second stay there. This is false. In approximately December 1998 or January 1999 the Petitioner made an appointment for me to see Professor John Lodewijks. The Petitioner had told me that our financial circumstances were dire and that we needed the extra income. I met with Professor Lodewijks who indicated that I could lecture there as an adjunct at a basic hourly rate of pay. Rajani had coached me in suggesting that one of the reasons I sought the employment was to solve our financial difficulties, and Dr. Lodewijks was sympathetic. I never fulfilled any terms of that offer because Rajani shortly thereafter assumed that he had cancer and scheduled our abrupt return to Utah. I signed no contract, and none was offered. I sought no other position and in fact did not seek that one except through the arrangement and encouragement of Rajani. After my

departure from Australia, Rajani then contacted Professor Lodewijks again to see about more permanent positions at UNSW in an attempt to entice me back to Australia.

39. Lastly, Exhibit "H" are the luggage tags attached to the luggage that the Petitioner brought with him in April 1999 containing the children's possessions. This is consistent with the Petitioner's explicit and tacit agreement with my return to the United States, at that time, as expressed in his letters including the letters to my father.

40. Consistent with that agreement and acquiescence, the Petitioner sought and secured a position under a one year teaching contract at Wagner College at about or prior to the time he filed his Hague proceeding petition. Nevertheless, the Petitioner failed to disclose not only his intention to return to the United States but the long term nature of that return until after the first hearing that was scheduled for August 24, 1999. Only when it became obvious that the Petitioner could not conceal his whereabouts did he disclose his contract with Wagner College and his relocation to New York. This position fulfills the Petitioner's expectation that he would "get out fast", return to the United States, and use it as a base of operations to upgrade his employment as well as serve the other family purposes identified above.

DATED THIS 30th day of November, 1999.

/s/ Cory Kanth
CORY LEIGH KANTH
Affiant

SUBSCRIBED AND SWORN to before me this 30 day of November, 1999.

/s/ Talisha Anne Blonquist
Notary Public
Residing in Summit County
County, State of Utah

My Commission Expires:
[LOGO]

CERTIFICATE OF SERVICE

I hereby certify that a full, true and correct copy of the above and foregoing *AFFIDAVIT OF CORY LEIGH KANTH* was faxed and placed in the United States mail at Salt Lake City, Utah, with first-class postage thereon fully prepaid, on the 30 day of November, 1999 addressed as follows:

Professor Rajani Kanth
Social Sciences
One Campus Drive
Wagner College
Staten Island, New York, 10301

Fax Number: 718 390 3467

/s/ Talisha Anne Blonquist

[Exhibits Omitted In Printing]

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

| | |
|---|---|
| RAJANI K. KANTH<br>Petitioner,<br>vs.<br>CORY LEIGH KANTH<br>Respondent. | **AFFIDAVIT OF CORY LEIGH KANTH, DATED AUGUST 18, 1999**<br>**Case No. 2:99 CV 532 C**<br>**Judge Tena Campbell** |

STATE OF UTAH )
: ss
COUNTY OF SALT LAKE )

CORY LEIGH KANTH, being first duly sworn upon her oath, deposes and states as follows:

## I. BACKGROUND FACTS

1. I am the Respondent in the above entitled action and I am fully competent based upon my own personal knowledge of the facts alleged herein to make and execute this affidavit.

2. The Petitioner and I were married March 16, 1990 in Salt Lake County, Utah. (See document page number 196).

3. Our two children, Malini Amstel and Anjana Kesari were both born in Salt Lake City, St. Marks Hospital, on April 1, 1993 and February 20, 1996, respectively.

4. The Petitioner was born in India and became a naturalized citizen of the United States in 1985. I am a U.S. citizen by birth and have resided in the state of Utah since then, except as explained hereafter. (See document page number 256). All family members travel on U.S. passports only. (See document number 254).

5. The following schedule describes the family travels over the past approximately three years. We have travelled to Denmark and Australia so that the Petitioner could complete temporary work assignments:

| DATE | EXPLANATION |
|---|---|
| 1993 through June 1996 | Children resided with both parents in Salt Lake City, Utah |
| June 28, 1996 | Mr. Kanth, alone, leaves to take a temporary position in Denmark |
| June 1996 through September 23, 1996 | Children reside with Respondent in Salt Lake City |
| September 24, 1996 through April 16, 1997 | The children and the parties reside in Denmark |

| | |
|---|---|
| April 16, 1997 through June 3, 1997 | The children reside with the Respondent and their maternal grandparents in Salt Lake City, Utah |
| June 4, 1997 through July 15, 1997 | Petitioner joins the children and the Respondent in Salt Lake City |
| July 17, 1997 through April 6, 1998 | The parties and the children reside temporarily in Australia where the Petitioner takes a temporary work assignment |
| April 6, 1998 through July 6, 1998 | The children live with the parties in Salt Lake City together with their maternal grandparents |
| July 8, 1998 through March 25, 1999 | The children and the parties reside in Australia while the Petitioner fulfills a temporary work assignment |
| March 25, 1999 to the present | The children and the Respondent reside in Salt Lake City, Utah |

6. Because the Petitioner and I wished to maximize the time that the children lived in Salt Lake, the Petitioner left for Denmark before I did with the children, and he also stayed on after our return.

7. Rajani moved to Salt Lake City in 1987 with his first wife to take up a "tenure-track" (7 year) position with the University of Utah, where he worked until 1994. I also taught at the University Utah as a doctoral student. After our marriage, in 1990, we lived "rent free" as care-

takers of a home owned by a friend who moved overseas. Rajani had lived in this same home after his divorce in 1988. Rajani and I lived in this same home for four years after our marriage until May 1994, when the owner sold the home. (See document page number 228).

8. At that time Rajani and I made an offer on a home in Sandy which was accepted. Rajani had a great deal of debt and one prior bankruptcy and had just lost his job. Therefore, my father cosigned on the loan and provided the down payment for the home. The agreement was that my father would be a title owner to the property along with Rajani. While the Petitioner's negotiations with his ex-wife to reduce support were ongoing, title was transferred to my father's name alone at the request of the Petitioner. (See document page numbers 84-88; 228-231; and 235-236).

9. We moved into the Sandy home in June 1994. (See document page number 87).

10. During parts of 1994, 1995 and 1996 Rajani was unemployed. We lost our car and my father helped us purchase a new one which we still own and has remained in Salt Lake City throughout all of our travels abroad. (See document page numbers 89-94 and 240).

11. During these times, Rajani's ex-spouse was garnishing his unemployment compensation. Under these circumstances we considered going abroad for purposes of temporary employment with the understanding and agreement that we would return to Utah where we had both lived and where my family resides. (See document page numbers 233-251).

## II. THERE WAS LACK OF "SETTLED PURPOSE" OR INTENT TO MAKE AUSTRALIA THE STATE OF HABITUAL RESIDENCE

12. In 1992 it became apparent that the Petitioner's contract with the University of Utah to teach in the department of economics would not be renewed. We looked first in the United States for employment and then, out of necessity, applied for a position in Denmark which a colleague of Petitioner had mentioned was looking for a visiting fellow. During all periods of time all of our possessions have been stored in Salt Lake City and we have taken only suit cases full of clothing and a small amount of toys, videos and books for the children when we travelled abroad. In 1993, Mr. Kanth was denied tenure at the University of Utah. He desperately searched for employment in the United States as a professor, sending out between 90 to 150 resumes to various colleges and universities. However, Mr. Kanth was unsuccessful. Therefore, shortly following the birth of Anjana, Mr. Kanth accepted a temporary academic position with the University of Aarhus in Denmark. Upon their return to Utah, Mrs. Kanth enrolled Malini in preschool. She made many friends and excelled in school. He immediately began looking for employment as a professor at colleges and universities in Utah and, alternatively, throughout the United States. He sent out hundreds of resumes to American schools over several months. However, he was once again unsuccessful in finding a job in the United States. (See document page numbers 235-238 and photographs).

13. All of our furniture and possessions have been stored in my parents' garage, or in the garages of my

grandparents or my brother's home. The Kanth family obtained a temporary visa and arrived together in Australia on July 17, 1997. They left all of their furnishings and personal belongings, other than a limited amount of clothing, in storage in Salt Lake City, expecting to return within six months. (See appended photos).

14. When we left for Australia, on both occasions, all of the furniture and other items including large and small furniture, our washer and dryer, and the other items appearing on list (see below), were stored here. These items were left in storage and have been left in storage because it was our intention to return to Utah no later than six months after our departure. (See document page numbers 95-96 and 001-002).

15. We have always maintained our mailing address in Salt Lake City. For any business which we have conducted, the Salt Lake City mailing address has been used as our return address. All credit card accounts, life insurance, and retirement fund accounts, bank statements, frequent flyer accounts and the like have continued to use the Salt Lake City address. Mr. Kanth maintained his Utah driver's license and eligibility to vote while abroad. (See document page numbers 52-80).

16. The Petitioner is required to keep his former spouse informed as to his employment circumstances so that his child support obligations might be adjusted (the existing child support order reflects Rajani's unemployed status). The Petitioner has used my parents mailing address as his residence address in his dealings with his former spouse. The Petitioner is delinquent in the payment of support under the Decree and has not paid

support for more than two years. (See document page numbers 100-106 and 108-116).

17. The Petitioner has never informed his former spouse of any other address except the Salt Lake City address when dealing with his former spouse or discharging his obligation under that divorce decree. (See document page numbers 118-120).

18. The Petitioner has also provided his former spouse with the address and telephone number of my parents for purposes of contact in the event of an emergency. (See document page numbers 107 and 119).

19. Before our first trip to Australia, I wished to remain in the U.S. I had asked Rajani for a divorce; and he insisted he would not take the position in Australia if I did not accompany him, and I finally agreed to go, primarily because his contract expired in 6 months. We quickly decided that we disliked Sydney and our decision to leave Australia at the earliest possible time became certain when we discovered the physical and medical risks to our children. We were informed while there of an out break of Meningia Cocyl. (See document page numbers 132-133). Malini became fearful of becoming ill that she refused to attend activities of any sort. (See document page numbers 125-130). He did receive a six-month appointment at the University of New South Wales in Australia. Neither Mrs. Kanth or the children wanted to move. They voiced their opposition to Mr. Kanth on several occasions. However, because of the family's precarious financial situation, Mr. Kanth accepted the position. He told Mrs. Kanth it would only be for six months and could lead to a position in the

United States. On this basis, Mrs. Kanth agreed to accompany him with the children.

20. There were other aspects of life in Sydney that we did not like and which created an unsafe and unacceptable environment for us to raise our children. In 1998 there was a significant health threat due to contaminated water in the Sydney area as well (a lesser scare had occurred shortly after our arrival in 1997). Malini was particularly frightened, and demanded that we return home. (See document page numbers 135-136).

21. Our first visit to Australia was always deemed to be a "spring board" to a position in the United States. While the family was in Australia, Mr. Kanth continued to search for employment in the United States. He failed to obtain any offers. The family had no money to return to the United States. Therefore, when the University of New South Wales offered him a six-month extension, he accepted. Because the family's six-month lease on their first apartment expired, they found alternative housing. They signed another six-month lease but broke it early to return to Salt Lake after three months. During their entire stay in Australia, Mr. Kanth kept control of each family members' passport. (See document page numbers 001-012).

22. In the spring of 1998 Rajani secured an interview at Franklin and Marshall College in Pennsylvania. We anticipated other interviews as well. It was financially impossible for us to fly back and forth between the countries for each interview. Given that our ultimate goal was to return to the United States we decided to return before other interviews were scheduled. Rajani and I had both

applied to numerous colleges and universities in the United States by this time. Mr. Kanth did not complete his second six-month term with the University of New South Wales. He, instead, returned with Mrs. Kanth and the children to the United States on April 6, 1998 in search of employment there. (See document page numbers 010-012; and 019).

23. Contrary to the Petitioner's allegations, our return to Utah in 1998 was not a vacation or holiday. Rajani's separation from the University of New South Wales was permanent and was granted based upon Rajani's request and his description of his difficulties in his personal life. We transferred back to Utah never expecting to return to Australia. We returned despite a job offer from UTS and despite losing a $1,120 rental bond. Petitioner searched for apartments in Salt Lake, and called Westminister College, the University of Utah, Salt Lake Community College, Salt Lake County Health Department, Rowland Hall, and the Waterford School regarding employment. I applied to Fidelity Investments, as well as other employers. He completed a full day of interviews and a teaching demonstration at the Waterford School. He also sent out application packages nationally. Mrs. Kanth enrolled Malini at the same preschool she attended the summer before. She and Anjana reunited with several friends and enjoyed playing with them. Mr. Kanth looked at several apartments in Salt Lake, where he also made many job inquiries. In the event he was not able to find a job in Utah, Mr. Kanth also submitted applications and resumes to several colleges and universities outside of Utah but within the United States. He interviewed for a position in Pennsylvania and traveled

to Harvard to explore his connections there. Mr. Kanth was again unable to find employment as a professor in the United States. He, therefore, accepted a position previously offered to him at the University of Technology, Sydney. (See document page numbers 189-195 and 020).

24. Once in Utah we determined that we might be forced to return to Australia. However, based upon our earlier experience we had the explicit understanding that this visit would be for a very limited time. This was based upon our earlier unsatisfactory experience with Sydney and the area, and the health risks of the children. The plan was to return in four to six weeks and at the most two months. Rajani anticipated a position at Duke University within that period of time to commence in the fall semester 1998. Rajani was sure that we would be back in the United States by fall 1998. (See document page number 056).

25. I made it clear and Rajani agreed that in the event that he was forced to stay on in Sydney beyond that maximum two month period of time that I would return with the children in advance of his return. This was consistent with our earlier experience in Denmark where I did not accompany Rajani when he initially left for Denmark and returned with the children in April, while he joined us at the expiration of his contract in June.

26. When we left for Australia the second time, our personal property remained in storage. Rajani made the decision not to ship the personal property to Australia. (See document page numbers 95-99).

27. Our departure from Sydney and the University of New South Wales the first time was based upon

Rajani's application for "health leave" after a psychic healer determined that he had a growth in his lower abdomen. Rajani immediately asked me to call my parents in Salt Lake to schedule our return and his medical treatment. Despite reassurances by Australian doctors, Rajani insisted on going back to the United States. Until I saw the May 22, 1998 letter from Dr. Jan Hogan, I did not realize that Rajani had used other reasons as the basis for the health leave. (See Petitioner's Exhibit "H").

28. Rajani's self serving report to Doctor Hogan concerning an "attack" on me is a fabrication of Rajani's that he reported in order to secure health leave to return to the United States. He did not want to tell any professional that he was acting on the advice of a psychic healer. Upon our return to Utah in April 1998 Rajani immediately travelled to Harvard University in conjunction with a research fellowship that he had obtained there, which he hoped would improve his employment possibilities in the U.S. This fellowship also coincided with an interview in Pennsylvania. By July 6, 1998 it became apparent, however, that we would have to return to Australia, albeit for a short period of time. We were very uncertain about the return and therefore delayed our actual flight to Australia to a later date based upon Rajani's report to the airline that we had been involved in a traffic accident, which was untrue.

29. I received an offer of employment in Salt Lake at this time. Rajani would not to allow me to accept it, as he felt he could not sacrifice the time he spent writing and doing research to take care of Anjana. The family was scheduled to leave for Australia on July 5, 1998. However, none of them wanted to go. They loaded the few suitcases

they packed into a van but decided not to leave. The next day, Mr. Kanth determined the family would have to go. He told them to put their bags in the car. They left so quickly between the time he made the decision and the time they left that they barely had time to reload their bags. The family left reluctantly for Australia on July 6, 1998. Their property again remained in storage. When they arrived, they negotiated a six-month lease for a fully furnished apartment that included a car. That was the shortest lease period the Kanth's were able to obtain.

30. Rajani had reassured me that our second stay in Sydney would be only one month, or six weeks, and a maximum of two months. However, Duke University failed to contact him as expected and we both became very worried. We had a string of accidents including a fire in our hotel and a car accident for each of us (See document numbers 81-83). We both doubted the prudence of our decision to return for a brief period of time to Australia. In a conversation at this time Rajani recited a list of colleges that were still considering his applications. He was particularly confident about one. He explained to me that he intended to return to the U.S. around Christmas 1998 for his annual job seeking conference (the American Economic Association annual meetings). Since one ticket would be paid for by his department, he said it would make sense for all of us to go then. He ended the conversation by saying that if he had not received an offer by that time we would all return anyway and simply begin looking for something else here. Rajani was worried that the more time he spent in his position at UTS as a lecturer in a business school (as opposed to a professor of economics at a nationally

ranked university in the U.S.) the more his reputation and prospects would be damaged. He reassured me that he would leave then even if there was not a position to come to. (See document page numbers 252-253).

31. In July 1998 we had negotiated a six month lease on a house. This was the shortest rental agreement we could find. Rajani negotiated with the owners for an early termination of the lease based upon our intention to return to the United States over the Christmas holiday. When Rajani left around January 1, 1999 he asked how long it would take me to pack if the family were to join him suddenly. He instructed me to begin packing and plan to come as soon as he sent word. However, no position materialised [sic], and Rajani returned. (See document page number 179).

32. Since August, 1998 Rajani had again and again made it clear that he would be happy for me to return to the United States but without the children. None of the jobs in the United States materialized. Mr. Kanth, however, continued to refuse to allow Mrs. Kanth and the children to return, as promised. Malini repeatedly stated she wanted to go home and asked on several occasions when they would return to Utah.

33. In January, 1999 a job offer from Singapore came and Rajani began to consider this and I became much more alarmed. (See document page numbers 027-029).

34. In March, 1999 Rajani angrily told me that he would never allow the children to be in my parents home unless he was with them there. This response was to my suggestion that the children and I could live in Salt Lake City while he "tried out" Singapore. He then stated that

they would be better off in India around "proper" people and proper little children. By this time I felt that I was being held as a prisoner, I was very worried and I knew that in anywhere but the United States Rajani would control my life and where I lived because of the financial, legal and emotional control that he had exercised. Mrs. Kanth and the children remained with Mr. Kanth in Australia against their will. On March 19, 1999, Mr. Kanth angrily told the children, "Today is the day I am going to cook your momma's goose." He spent the next six days searching the house for their passports and exchanging phone calls with relatives in India. As Mrs. Kanth was leaving to take Malini to school the morning of March 25, 1999, Mr. Kanth demanded that Mrs. Kanth give him the childrens' passports as well as her own. Frightened, she told him she would get them for him when she returned. When she came home, Mr. Kanth had left for work. Fearing for her safety and her future with the children, Mrs. Kanth returned with the children to the United States on March 25, 1999. She left a note for Mr. Kanth telling him they would be at her parents' house in Utah. (See document page numbers 027-029; and 166).

35. After I returned with the children to Salt Lake on March 25, 1999 Rajani arrived on April 2, 1999. He came to the home carrying two large suit cases and a duffel bag filled with most everything of the children's which had been left behind in Australia. He did not appear to be upset that we were in Utah. He also planned to stay in Utah at that time. After he returned to Sydney he wrote to my father saying "if Australia does not please [Cory] . . . I am ready to now return to Utah and look for employment there . . . " Mr. Kanth traveled to Utah on

April 2, 1999. He did not appear to be upset that Mrs. Kanth and the children had left. He seemed relieved to be back in the United States. He never demanded that the children return to Australia. (See document page numbers 032-033).

36. After returning to Salt Lake Rajani never asked me once to return the children to Australia until the proceedings were commenced. However, he did attempt to persuade me either to return with him, or join him somewhere in the U.S. (See document page numbers 032-033, and 261-262).

37. While in Utah in April 1999 Rajani attempted to find work here. This proved unsuccessful and he decided to return again to Australia. He said that he was on "family leave" and if he chose not to return "they would understand completely." When he decided to return he said nothing about my returning the children. In fact he stated that he was grateful to me for giving him "a wake-up call". (See document number 262). In a faxed letter to me dated May 11, 1999 he says "An act of will as heroic as you leaving Sydney: that's all it takes . . . " He returned to Australia April 22, 1999 after 20 days in Salt Lake. He called many times thereafter to discuss issues of visitation. He informed me that he obtained a job at a college or university in the "North East" and that he had persuaded them to allow me to teach in conjunction with their offer to him. Because I refused to join him in the "North East" Rajani explained to me that he would not take that position because he had been informed that if he stayed in Australia the children would be sent back to him as a matter of international law. I told him that such an offer might not come again. Later he called me and

told me he had decided to "take the plunge" and remain in Australia for purposes of trying to have the children returned to him. It is my impression based upon all of our conversations that Rajani is much more interested in reconciliation with me than custody of the children, but that he will use custody of the children as a tool or weapon to accomplish reconciliation. (See document page numbers 032-033 and 261-262).

38. Before Rajani left for Australia April 22, 1999 he told me that he "cared nothing for the children" and I was "all that mattered". He stated, however, that if I chose not to return he would "come after" the children. When Mr. Kanth told Mrs. Kanth he was returning to Australia, he admitted it was the only way he might regain custody of Malini and Anjana. He also told Mrs. Kanth that he "cared nothing for the children," she was all that mattered.

39. This conversation took place after the first hearing regarding the Salt Lake County protective order. Rajani had failed to appear at the hearing although he was in Salt Lake. He stated to his attorney that he had to returned [sic] to Australia. After the first hearing his attorney offered temporary custody of the children provided he was allowed six weeks of visitation in Australia during the summer. We rejected the offer but did consent to visitation in Utah. Rajani has not come back to Salt Lake since that time to exercise visitation. Afterwards, during a telephone conversation in June, 1999 Rajani stated that the only reason he was staying in Australia was because "the process will bring them [the children] back to him" and he would not come to Utah for visitation or any other

purpose because he was afraid of paying support and being arrested (for violation of the protective order).

40. Rajani's own statements and letters suggest that there was no settled purpose of residing in Sydney. His letter of October 10, 1998 to Florida Atlantic University states that, even though he currently resides in Australia, " . . . my sights are set elsewhere; for years now I have been seeking to return to the U.S. for professional and personal reasons (my family lives in Utah)." (See document page number 021).

41. To my father in a letter dated May 5, 1999 he states "I am trying my best, as I have for years to find employment back in the U.S. . . . I have spent the last five years applying for jobs in the U.S.". In this same letter, he promises that if I return to Australia, "I have promised to organize life differently . . . we can . . . live normally instead of living as if we were leaving the next day as we have since we arrived in Australia." (See document page numbers 032-033).

## III. THE PETITIONER'S ABUSE AND CONTROL OF THE RESPONDENT HAVE CREATED AN ABSENCE OF VOLUNTARINESS, PURPOSEFUL DESIGN OR INTENT ON THE PART OF THE RESPONDENT TO MAKE AUSTRALIA THEIR HABITUAL RESIDENT

42. Because of my misgivings, as well as Rajani's own misgivings, he constantly reassured me that we would soon be able to return to the United States. He also often told the children we would soon be returning. His attitude changed on August 29, 1998 the day after he had

found out that I had bathed the children while he was away at work the previous day. He became angry and said you "can't be trusted" and, he would "have to figure out what to do about it". At that time I asked him to let me return to the United States and told him that I would file for divorce. He responded that I was "nothing but a squaw" and said he would "rather shoot [himself] in the head rather than allow you and your family to raise these little girls." During this exchange both of the girls were present. After that, on many occasions, he told me that I could "return to Moab" anytime I wanted, but never with "these children". My mother called from the U.S. within an hour or so of this conversation. I asked her to find out for me what my rights were concerning leaving Sydney with the children. Shortly before, I had already telephoned "Legal Aid" advisors in Sydney (a hotline). They had told me that they did not think Australia could exercise jurisdiction over us, as we were on temporary residence Visa's only, without permanent resident status. Also, they told me that in Australia there is a mandatory one year waiting period between filing a divorce action, and any attention from the Court. As we expected to leave long before that, I knew that obviously wasn't an option, even if Australia could exercise jurisdiction. My fear was that until Rajani decided we could leave Australia, I could do nothing but wait. Rajani knows that the most effective way to control me is to use the children as a weapon, and he knew I would never leave without them.

43. For unexplained reasons, Rajani became extremely controlling with regard to both children, and Malini, particularly. For instance, he would not permit me

to bathe or dress the children without his approval. This behavior started around Malini's second birthday, and became more pronounced over time. Ultimately, if I dressed Malini in a way that Rajani did not like he would take her into her room, change her, leaving her other clothing from closets and drawers in a heap. He exhibited the same behavior with Anjana, but to a lesser degree. He also insisted that the house be kept extraordinarily warm and that we stuff cracks with old clothing to keep out drafts. When the children and I were uncomfortable, he became angry with me and I insisted I could find another home if I disagreed. In February or March 1999, Anjana ran a fever, but still Petitioner insisted on keeping the house super warm. Anjana broke out in fever blisters on her forehead, and only then did Petitioner admit he shouldn't have insisted on such heavy clothing. Even so, he insisted windows were to remain closed to keep in the warmth. During their stay in Denmark, Mr. Kanth's control of Mrs. Kanth worsened. He altogether refused to allow Mrs. Kanth to bathe the children for long periods of time. He forced her to cover any cracks in their apartment with old clothing to keep out drafts

* * *

Motion to dismiss Protective Order). (See document page numbers 278-285).

46. He has told me to "remember my place and not act up".

47. This controlling behavior became worse in Australia. He started to physically threaten me, stating repeatedly that he would "kick my teeth in" if I bathed the girls when he forbade me to. He also started calling

me a "squaw", "Avon lady" and "low class", or an "idiot". He made these statements in front of the children. While in Australia, Mr. Kanth's controlling and abusive behavior toward Mrs. Kanth worsened. He threatened to "kick [her] teeth in" when he discovered she bathed the children without his permission. He refused to allow her to choose the children's clothing. He called her derogatory names in front of the children, such as "squaw," "Avon lady," "low class" and "idiot." He stood over here when she brushed the childrens' hair and angrily grabbed the brush from her hands if either said, "Ouch." He allowed her to leave the house only to take Malini to and from school and to buy groceries. On another occasion, Mr. Kanth threw Mrs. Kanth out of their apartment in her pajamas on a cold winter morning and refused to let her back in. (See document page numbers 203-204).

48. During our second visit to Australia Rajani also began to monitor and strictly control any money he gave to me. He never permitted me to be a signer on a joint checking account. I have had no credit card accounts, except one that I don't use because my parent [sic], not Rajani and I, have said [sic] on its balance since we left for Denmark in 1996. Rajani has credit card accounts but he only allows me to use his account to buy a specific item that he has given me permission for and then asks for the card to be returned. He gives me enough money to buy limited groceries or a specified item and insists that I give him any change. Mr. Kanth gave Mrs. Kanth no money with which to open a checking account and, because of bankruptcy he filed in their names several years earlier, she was unable to obtain a credit card.

49. Rajani also started monitoring my behavior closely while in Australia the second time. He only taught two evenings a week and the rest of the time he was at home. When he was at home I could only leave the home with his permission and for some specific reason. If I returned later than expected I was called to explain. Rajani would often fall into a "silent rage" and not speak to me for long periods of time. When I could leave I had to wait for Anjana to sleep. Rajani would only allow me to leave if Anjana was sleeping because Rajani would nap frequently throughout the day. (See document page number 195).

50. Many times I was asked to socialize with other mothers. Rajani would refuse because he insisted that I take care of Anjana.

51. In August 1998 I attempted to contact attorneys in Australia to find out what my rights were regarding leaving with the children. I was prevented from doing this because we lived in the suburbs, and the attorneys were in the city, and I had no excuse for taking such a long trip.

52. Rajani held my U.S. passport and the children's. After his wife subpoenaed his banking information in 1995, Rajani started keeping all cash in a waist pack which he either hid or kept on his person. I think he kept the passports in the waist pack as well.

53. During our first trip to Australia Rajani gave me Malini's passport in order to register her for school and he gave mine to me when I need [sic] to change some money. He asked for Malini's passport back, but not mine.

54. In January 1999 he gave me all of the passports so that I could prepare applications to go to Singapore inasmuch as his job was contingent upon us receiving Visa's. I did not return them at that point. He did not ask for them back until March 25, 1999. He claimed he needed them back to have them stamped for Australian Visa's. However, the Australian Visa stamp was good until year 2001. We had a significant disagreement March 19, 1999, and afterwards Rajani threatened to throw me out (as he had done as recently as November 1998). At that point I noticed that Rajani was looking through drawers, closets and elsewhere for the passports. Then he asked for their return March 25, 1999. (See document page numbers 027-029; 203-204).

55. After returning to Salt Lake in 1999, Karen Sasaki-Black, a Salt Lake psychiatrist whom the children and I met with subsequent to our return, noted that the girls, in separate interviews, both remembered Rajani as threatening to "cook mama's goose". (See document page number 258).

56. Because of our social isolation in Sydney, it is unlikely that anybody there would have witnessed such behavior first hand, although my mother has seen such behavior while we have resided with my parents in Utah.

## IV. FACTS AND WITNESSES BEARING ON THE CHILDREN'S BEST INTERESTS ARE PREDOMINATELY SITUATED IN UTAH

57. While in Australia the children saw various doctors at the UNSW health clinic, or in the emergency room of the Prince of Wales hospital. While in Australia, the

children visited doctors for various childhood illnesses. They did not have one doctor in Australia but saw several for various illnesses.

58. The children's pediatrician is Dr. Tom Metcalf, of Salt Lake; he has been the exclusive pediatrician since the children's respective births. Dr. Metcalf has cared for the children in between visits to Denmark and Australia. He has completed physical exams of both girls before they have left for Australia and following our return.

59. Contrary to Rajani's allegation that we engaged in psychological counselling in Australia, Rajani was the only one who sought psychological counselling. Rajani refused to allow Malini to see a therapist because she would then be "labelled". Rajani instructed me to get reading references from the hospital rather than permit therapy.

60. Since I returned to Salt Lake, Rajani has sent me a book, and a complication of books and articles on the subject of "autism" which he has told me, at various points throughout the years, might be the source of Malini's "problems". (See document page numbers 149-165).

61. Since returning to Salt Lake I have secured the help of Dr. Denise Goldsmith, psychologist, who is the therapist for Malini.

62. Malini first attended preschool in Salt Lake. Upon her return from Denmark April 6, 1997, Malini attended "Cottonwood Canyon Montessori" from April through the end of the term, and through the summer term (April 21 – July 14). During this time, she also attended an art workshop sponsored by the University of

Utah. Upon our move to Australia, we enrolled Malini in a child care center in the belief that she needed time with other children. Malini was withdrawn from this child care center, referred to by the Petitioner in his Exhibit "I", because of the threat of the Meningia Coccyl out break referred to above. She attended the child care center for 10 weeks. Although she was registered for two full days per week she attended fewer hours, as she did not adjust well to being apart from me. Malini was terrified to go anywhere after learning she could contract a deadly strain of meningitis through a sneeze from an infected person. She routinely asked Mrs. Kanth if she was going to die and isolated herself from others. When she did attend school, she generally ate lunch alone. The children in her school excluded her and referred to her as "our American visitor." She did not make her first friend until the middle of the year.

63. Malini began kindergarten at "Randwick School" in Sydney in February 29, 1998 and attended only a handful of days until we left on April 6, 1998, and returned to Salt Lake City. In Salt Lake City she attended and graduated from Montessori School of Willow Creed. (See document page number 138).

64. When we returned to Sydney July 6, 1998 we attempted to enroll Malini in school in the area of Coogee where we were looking for housing. However, the vice principal of the elementary school said that they were full. I was successful in getting Malini re-enrolled in Randwick, which was in a suburb adjacent to Coogee. Originally they were not sure if they could take her, as her files had been put into storage when we had returned

to the U.S. in April, 1998. They did not believe we [sic] be returning.

65. Malini attended only three piano lessons with me in the fall of 1998. Exhibit "K" to the Petitioner's memorandum is misleading because the other lessons were missed and not attended by Malini. In any event, the duration of the lessons was less than four weeks.

66. Malini attended only one lesson with Nicholina Kuner, at the academy ballet. Exhibit "L" to the Petitioner's memorandum is misleading because it may lead to the inference that there was a longer association with the academy. Likewise, Malini joined a drama academy in its last term 1998 and attended only three lessons.

67. While in Australia we attempted to engage Malini in extra curricular activities because Malini had not made any friends in Australia. This was also the case in Denmark. Malini did not have friends over often. Malini can be said to have only two friends while we have been in Australia. Both girls visited our house infrequently, only once and twice per girl.

68. Anjana had no friends in Australia nor any significant playmate. No neighborhood child visited her any point and we were not even aware of children her age in the neighborhood.

69. Contrary to the Petitioner's allegation, Malini's performance in school was not satisfying. Malini is a gifted girl who does well in school, however she did not perform anywhere near her ability while in Australia. Malini's kindergarten teacher in Australia expressed that Malini has "experienced some difficulties adjusting to the

whole-class directions", and "often requires personal assistance." She also notes that Malini is "quietly spoken" and "quite timid and reserved". Malini often expressed to me that she felt awkward with regard to what she was told was her "American accent". (See document page numbers 143-144).

70. Malini had difficulty interpreting the Australian "accent". This was difficult for Malini inasmuch as she had qualified for a "gifted student" program. When I asked Malini about these classes her response was "I don't know. They spoke too fast for me to understand."

71. Malini experienced persistent stomachaches and headaches throughout all periods of time that she attended Randwick School in Sydney. These symptoms disappeared during school holidays and while we were in Salt Lake, and would reappear when she resumed school in Australia. She has had no such reoccurrence since we returned to Salt Lake. Since returning to Utah, Malini has become much more involved in school. She has not experienced any panic attacks and has become more extroverted, playing and associating with friends with whom she attended Preschool prior to leaving for Australia.

72. We lived in no less than seven residences while in the Sydney area. (See document page numbers 167-184).

73. In July 1997, we stayed in the Barker Lodge for 10 days before we moved to an apartment on Houston Road. After this we looked to the UNSW housing office for short term rentals. We stayed at a house on Lenthall street, in Kensington, and at an apartment on Dolphin street, on the border between Randwick and Coogee,

because they were only six and four month leases, respectively. Both were fully furnished. Additionally, we stayed in an apartment at Cowper Street because it was a short term lease. In fact, when we left Cowper Street in April, 1998 we lost a $1,120 deposit. Before staying at Lenthall Street, Rajani wanted to stay at the Grand Hotel because he felt sure that we would be returning to the United States when he heard from Duke University, and he did not want to lose another rental bond. (See document page numbers 177-179 and 167-184).

74. There was never any talk or consideration whatsoever of looking for a house to purchase or for a long term lease the entire time we stayed in Australia. During one six month period we stayed in four different homes. During the first trip to Australia we acquired a table (which Petitioner needed for class preparations), a used bed, and minimal kitchen items (many of which were also used).

75. During our second trip to Australia we did not even take possession of those items except for a baby carriage which had accidently been left behind in Australia. We rented only fully furnished premises and we acquired no additional household items or furniture whatsoever. (See document page numbers 179-184).

76. I had and have the principal responsibility for raising the children. On the few occasions when the Petitioner took the children outside he always took along a female companion. If it was not me then it would have been a young woman like Ms. Tracy Lee. Such was the case shortly after our return to Sydney. Beyond that Ms. Lee would only have visited our home on three or four

occasions. (See Rajani's Exhibit "G" attached to his memorandum).

77. Rajani would have acquaintances to the home from time to time but on a very limited basis. Peter Slezak, and Evan Jones, both referred to in the Petitioner's affidavit, were only introduced to myself and the children, and engaged in no significant discussion with him. Rohit Chopra, one of Rajani's students at UTS, visited our home once and had dinner with Rajani. (See Rajani's Exhibits "M", "N" and "O" attached to his memorandum).

78. At the very least, it is clear that Rajani does not intend to stay in Australia any longer than he has to. If his history is any help in predicting his future behavior, he will move from job to job. The only real home base that the children have ever known is Salt Lake City. (See document page numbers 235-238; 001-002; and 014-015, also 251).

## V. REMOVING THE CHILDREN FROM SALT LAKE CITY AND THE CUSTODY OF THEIR MOTHER WOULD DISRUPT THEIR MOST SIGNIFICANT PARENT/CHILD BOND AND CREATE A GREAT RISK OF HARM

79. Malini has an unusually strong bond with me and her grandmother, my mother. Malini nursed until she was two and one half years old. I would characterize her emotional state as highly fragile. She is a child who has just begun to conquer many emotionally and behavioral difficulties. These difficulties and her unusually strong

dependence upon me are due, I believe, to our frequent moving abroad and our social isolation.

80. Anjana nursed until she was one and one half years old. My pregnancy with Anjana was particularly difficult. I was prescribed bed rest for almost five months. During that time Malini refused to leave me and would stay all day with me not even going outside to play unless I accompanied her.

81. Malini and Anjana are particularly close to each other. They have been each others' only friends while we have been aborad [sic].

82. I have taken the sole responsibility for the children's primary care by bathing them, feeding them, grooming them and changing diapers, dirty pants and "potty" training and so forth. I have also taken the sole responsibility to teach and train the children. I do not recall anytime when Rajani has participated in any primary care activities nor discussed with the children their feelings, fears, problems, issues of right versus wrong and moral values and so forth.

83. There has never been an occasion when Rajani has taken the children to a doctor's appointment, lessons, or other activities, or even out for an outing, unless he has accompanied me except for his visitation in April of this year.

84. Except for visitation this year neither girl had spent any significant amount of time alone with Rajani, either day or night. This means that they have not spent more than an hour or so with Rajani alone up until his visitation time.

85. Following our separation Rajani visited with the children in Salt Lake City. While they were with Rajani both children cried for hours (Rajani and Malini both called me, and Rajani reported the situation to me, which I could also hear). (Rajani told me) Anjana literally cried herself sick, throwing up and so on. Malini called and, while sobbing said "Mama you don't understand, I just need you so much . . . " She only calmed down when I told her that if she would just let herself fall asleep perhaps the next day Rajani would consider returning them. Both children have responded very emotionally to any subsequent visits by Rajani and have been very frightened. They were also frightened when my father got in Rajani's car. When Rajani visited after his overnight visitation Malini would hug me tight and say "No, don't let daddy take me again." Mr. Kanth took the children for a visit in April of 1999. He did not return the children by their bed time, as he said he would, nor did he call Mrs. Kanth. Several hours later, Mr. Kanth telephoned Mrs. Kanth to tell her he would not ever return the children. Mrs. Kanth could hear Anjana crying in the background and Malini begged, sobbing, to be returned to Mrs. Kanth. When Mr. Kanth relented and finally returned the children late that evening, Anjana's pants were soiled. Following the first visit, Mrs. Kanth had Mr. Kanth served with a protective order which provided for visitation according to state law. Approximately one week following the first visit, Mr. Kanth took the children for visitation pursuant to the protective order. Mrs. Kanth instructed him to give Anjana some Tylenol for a fever she had. He improperly gave Anjana Malini's medicine. Mr. Kanth called Mr. Kanth and let Malini speak with

Mrs. Kanth. Malini cried, "Oh, momma. You just don't know how much I need you." Anjana was crying in the background. Mr. Kanth called Mrs. Kanth a second time to tell her that Anjana cried so hard to go home that she threw up. For approximately eight weeks following, Malini cried constantly begging for reassurance that Mr. Kanth would not take her again. When he called on the phone, she told Mrs. Kanth she did not want to talk to him. When Mrs. Kanth instructed her to speak to Mr. Kanth, Malini asked him repeatedly if he would agree not to take her overnight again. The next time Mr. Kanth drove to the house, the children panicked when he stopped his car and opened his doors. They both backed away from the car. Anjana began screaming for her grandma and grandpa. Malini grabbed Mrs. Kanth and cried, "No, don't let daddy take me again."

86. Following visitation Malini had period panic and worrying attacks. She was worried that she would have to leave again. One night, during this time, I was reading a poem to Malini and we came across the word "despair". I explained the meaning of the word when Malini asked about it and she said "Mama that is what I felt like the night at daddy's." Malini is [sic] also told her psychologist and me that going with daddy would be "worse than dying".

87. During their entire lives the children have not gone to sleep at night unless they have cuddled with me, one on each side. If I even attempt to move them to the end of the bed they cry and are upset and cannot fall off asleep until I return them to their position on either side of me. They awaken many times at night and check to see if I am there. The children are both emotionally and

physically bonded with Mrs. Kanth. They have always slept in Mrs. Kanth's bed, one on each side of her. They awaken several times a night to check for her presence and panic if she does not answer or pat them. Mr. Kanth did not allow the children to feed themselves but required Mrs. Kanth to feed them. As a result, Malini has refused to eat at school because her mother is not there to feed her. The children are only now beginning to feed themselves.

88. There is no question in my mind that attachment of the children is unusual and it is for that reason that I have secured counselling for Malini with Dr. Denise Goldsmith, a Salt Lake City psychologist. The children's attachment to me is not something that I have consciously attempted to create. Rather, it has simply developed from our travels abroad during the children's young years, and the dynamics of our family relationship.

89. At Rajani's insistence I have been the primary care giver for the children they have come to rely totally upon me and perhaps to an unusual degree. It is my hope that I can help the children develop a healthy relationship with Rajani which would permit frequent visits with him so that they can establish a healthy relationship with their father and, likewise, a normal and healthy relationship with me. That is why I have sought expert help at this time.

90. In the spring of 1999, at about the time of Malini's birthday and prior to her birthday. Rajani and I had an argument in front of the children after which he demanded the return of their passports. Afterwards, on a

walk with Malini I had to explain why we needed passports. When we discussed our return to Salt Lake Malini started to cry and held me close saying "I just want to go home today, Mama. Please let's go back to Salt Lake today." I explained that would mean that she would miss her birthday party. She replied, "I can celebrate with grandma and grandpa, Taran and Anjana and you. Please mama let's go home today."

91. More recently Malini has volunteered to me the following statement: "Salt Lake City is my home, and I always looked forward to living there."

## VI. THE PETITIONER'S AFFIDAVIT IS INCOMPLETE AND DESIGN [sic] TO LEAVE AN INCORRECT IMPRESSION AND GENERALLY LACKS CREDIBILITY

92. The Petitioner's affidavit is incorrect in many particulars. Half truths are stated in order to create the appearance of permanence in Australia. Specific examples are as follows.

93. The Petitioner has attempted to characterize the parties' residence in Salt Lake as less than permanent or indefinite. The parties did not just "rent" a residence. Rather, they spent four years care taking a home. (See document page number 228).

94. The Petitioner's testimony regarding the purchase of the home in Sandy does not evidence the parties' title and ownership interest in the home nor the fact that it was, indeed, our "home" in every significant sense of that term. (See document page numbers 084-090).

95. The Petitioner incorrectly characterizes our return from Australia in April 1998 as a "vacation" or "holiday". In fact, it was our definate [sic] and settled purpose to stay in Salt Lake at that time. (See document page number 189-195 and 032-033).

96. The Petitioner attempts to utilize the letter of Dr. Jan Hogan to explain our return to Salt Lake in April 1998. In fact, the letter was based upon misrepresentations of the Petitioner to Dr. Hogan in the first place. (See document page number 189).

97. Petitioner fails to indicate the limited nature of Malini's involvement in extra curricular activities. He also fails to notice Malini's participation in such activities in Utah.

98. The supporting letters attached to the Petitioner's affidavit lack a full explanation of the limited basis upon which the authors render their observation or opinion.

DATED THIS 18th day of August, 1999.

/s/ Cory Kanth
CORY LEIGH KANTH
Affiant

SUBSCRIBED AND SWORN to before me this 18 day of August, 1999.

/s/ Talisha Anne Blonquist
Notary Public
Residing in Summit
County, State of Utah

My Commission Expires:
[LOGO]

CERTIFICATE OF HAND DELIVERED

I hereby certify that a full, true and correct copy of the above and foregoing *AFFIDAVIT OF CORY LEIGH KANTH* was hand delivered, on the 18 day of August, 1999 addressed as follows:

John E. Diaz
DIAZ & ASSOCIATES
350 South 400 East, Suite 101A
Salt Lake City, Utah 84111

/s/ Talisha Anne Blonquist